

Dinges taken on behalf of the respondent and insurance carrier.

ISSUES

- (1) Whether claimant suffered a compensable injury arising out of and in the course of his employment with the respondent on the date alleged.
- (2) Whether claimant provided notice to the respondent pursuant to K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board makes the following findings of facts and conclusions of law:

- (1) Claimant has failed in his burden of proving he suffered an accidental injury arising out of and in the course of his employment on September 14, 1993, while working for respondent, D & S Masonry, Inc.

Claimant was employed by D & S Masonry, Inc., moving bricks on September 14, 1993, when he alleges he fell from a scaffold injuring his back, neck, shoulders, arms, and wrists. Claimant was unable to provide any witnesses to this incident even though several other employees were present on the job site at the time of the alleged fall. Claimant, in a conversation with Mr. Robert Dinges, part owner of D & S Masonry, Inc., failed to notify the respondent of an alleged injury on that date. Claimant further failed to seek medical care on the date of the alleged fall and instead waited some two to three weeks before attempting to contact a doctor.

Mr. Robert Dinges, the claimant's boss, was present at the work site on the alleged date of injury. He specifically remembers that several bricks fell off the scaffold but was unaware that anyone had been injured. After the bricks fell, Mr. Dinges inquired if anyone had suffered an injury or had been hurt in any way and the workers, including the claimant, responded in the negative. Approximately two to three weeks after the incident, claimant approached Mr. Dinges and advised he needed to go to see a doctor but did not connect this desired medical care with any work related injury. During the two to three week period between the alleged fall and the claimant's request for medical care, claimant sought no medical treatment and advised none of his co-workers of any on the job difficulties.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v.

Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991).

Claimant did receive a physical examination from Dr. Michael J. Poppa, a board certified occupational medicine osteopath, in Kansas City, at the request of the respondent. Other than complaints of tenderness, claimant's examination was normal, with the doctor finding a full range of motion of the cervical spine, shoulders, thoracic spine and lumbar spine. The claimant had normal reflexes of the upper and lower extremities, and evidenced no sensory loss in either the upper or lower extremities. Dr. Poppa opined that claimant suffered no orthopedic or neurologic abnormalities at the time of the examination. Dr. Poppa further opined that claimant had recovered from any soft tissue contusions of the shoulder and left wrist, had reached maximum medical improvement and was capable of gainful employment without restriction. This examination on January 12, 1994, comprised the only medical evidence presented, with the exception of Dr. Campbell's prescriptions for x-rays.

The Appeals Board finds claimant's allegations of a work related injury to be unsupported by a preponderance of the credible evidence.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board, for preliminary hearing purposes, that the Order of Administrative Law Judge Floyd V. Palmer dated February 25, 1994, is affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Stephen P. Doherty, 100 Sec Bank Bldg, 707 Minnesota, Kansas City, KS 66101
Matthew W. Tills, 801 Walnut, Suite 300, Kansas City, MO 64106
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director